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Edward W. Clyde; Ray R. Christensen; Ned Warnock;

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IN THE SUPREME COURT OF THE STATE OF UTAH

FILED
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IN RE

GRANT MACFARLANE

State Supreme Court, Utah

Case

NO. 9051

BRIEF OF RESPONDENTS

EDWARD W. CLYDE

RAY R. CHRISTENSEN

NED WARNOCK

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IN THE SUPREME COURT OF THE STATE OF UTAH

IN RE

GRANT MACFARLANE

}

Case

NO. 9051

BRIEF OF RESPONDENTS

THE FACTS

The evidence in this case consists essentially of a condensation of the record in the case of *In Re Swan's Estate* (Utah), 293 Pac. (2d) 682. We are mindful that the court in that case had an opportunity to examine the record, and to familiarize itself with the facts. However, since that case was decided there have been some changes in the personnel of the court, and we recognize that after a lapse of more than three years' time, the facts may not be fresh in the minds of the court. Since the statement of facts presented by petitioner emphasizes those facts favorable to him, and largely ignores those facts which are unfavorable, and upon which the decision below was based, we deem it necessary to set forth the following facts in bold relief:

1. Although Gale Swan technically had testamentary capacity, she was retarded mentally, and her mentality did not reach the adult level.

The undisputed testimony of her aunt, Bell Martself, establishes that in early childhood Gale was afflicted with severe epilepsy; that when she was in her early twenties, she was confined in a sanitarium at Battle Creek, Michigan; that at that time she knew nothing of her surroundings and did not recognize members of her family. When she returned to her family home in Salt Lake, she brought with her a nurse, and from that time she continued under a nurse's care until many years later when a remedy was found which would control her attacks. (R. 147-149)

Gale paid much more attention to men than to women. "Gale believed in everybody. She had a childlike belief those people have . . . Gale has always been a child to me." (R. 153) "She had very little judgment as to the proper thing to do." (R. 156)

The testimony of Mrs. Martself was corroborated and confirmed by the testimony of Gale's sister, Theo Hendee. Gal had a serious illness in 1949, after which she seemed weak and confused. (R. 191)

During the last years of her life, she was under the regular care of psychiatrists. She was seen professionally by Dr. Frank, a psychiatrist, no less than 60 times in the year 1951, the year preceding her death. (R. 276) Dr. Darke, another psychiatrist, who examined her at

the time the second codicil was executed, testified that she had a mental age of 12 and that she had failed to mature mentally. His report was based in part upon information furnished by Gale, *by the accused*, and by Dan Kostopolus, another beneficiary under her will. (R. 286-288) Dr. Garland Pace, another psychiatrist, who cared for her during the latter years of her life, following the death of his father who had previously cared for her, testified that she did not have average intelligence; that her intelligence was in the range of ages 11 to 13, and that she never matured mentally. He further testified that mental deterioration may accompany epilepsy; that she was emotionally immature, and that such persons are susceptible to influence and suggestion. (R. 290-291)

Clair Mortensen, a trust officer at Walker Bank, who handled her property for her, testified that she was more susceptible to men than to women and that she did not have a normal adult mind. (R. 313) In his opinion she had the age of a fourth grader in arithmetic and writing. (R. 350)

One of her companions, Dorothy Wagstaff, testified that Gale trusted people (R. 316), and that she never went any place alone during the time that she knew her (R. 321).

2. The fact that Gale was retarded was known or should have been known to the accused.

Mrs. Hendee, Gale's sister, indicated to Mr. Macfarlane that she was anxious about her sister Gale and

that she would rely upon Macfarlane to keep her informed. (R. 30) In 1950, Macfarlane learned that Gale had attempted to make a loan to her friend Forsberg in the approximate amount of \$3,000. When Gale's father learned of this, he immediately insisted that the money be returned. Macfarlane also knew that Mr. Swan was very tight-fisted. (R. 46) However, following the death of Mr. Swan, Gale became much freer with the accused. She executed to him a general power of attorney, placed in his custody the pass books to all of her bank accounts, and made gifts to him and members of his family of stocks, bonds, and cash in the approximate amount of \$10,000. (R. 63 to 74)

At least a year before Gale's death, and possibly as early as 1949 or 1950, Macfarlane learned that she was an epileptic. (R. 53-54) He knew that she was under the care of Dr. Pace, a psychiatrist (R. 54), and also under the care of Dr. Frank, another psychiatrist. (R. 78). He also arranged for an independent medical examination of Gale before the second codicil was executed, and knew that a psychiatrist was called in to assist with the examination. (R. 42). He likewise knew that over the course of the years from 1946 to the time of her death, Gale was confined in the hospital many times, and he visited her there. (R. 114-15) After her return from the hospital on one occasion, she was under the care of a trained nurse. (R. 136)

Much of the foregoing evidence comes from the lips of the accused himself. In addition, there is the testimony

of Mrs. Folden, a registered nurse who cared for Gale, that Macfarlane came to the home quite often when Gale was a bed patient, and that he always closed the door to her room when talking to her. (R. 265, 272)

Dr. Frank testified that he advised Mr. Macfarlane that Gale should have a guardian appointed. (R. 276)

3. Macfarlane had reason to know, that in naming himself as a beneficiary of his client's will, he was engaging in conduct which was at best highly questionable. It has been urged that there are no canons of the Utah State Bar or the American Bar Association prohibiting the conduct engaged in by Macfarlane, and that he had no reason to be aware of any impropriety in what he was doing. Let us give to him the benefit of all doubt (a benefit, incidentally not accorded to any laymen, who are presumed to know the law), and assume that he had no reason to be aware of any question concerning his conduct at the time the original will was drawn, still forcible notice of this came to his attention prior to the time the first codicil was drawn when a will contest was filed in the probate of another will prepared by him wherein he was designated as a beneficiary. (R. 56, 79) That will contest was subsequently compromised and apparently Macfarlane at that time had sufficient concern as to the correctness of his procedure to warrant his making some concessions in that will contest. After this he still proceeded to draw two codicils for Gale Swan, the first of which increased his interest as a beneficiary under the will, and in the second of which he maintained a very substantial interest to the

extent that he was the largest single beneficiary under the will, receiving more than one-third of the entire estate.

It is significant to note here that Mr. Clair Mortensen, not an attorney, was fully aware of the impropriety of such conduct. Although Gale wanted to remember Mr. Mortensen in her will, he requested her not to do so, stating that such would be embarrassing to him. Certainly, the relationship of trust officer to a client is no more delicate nor of higher fiduciary status than that of attorney and client.

4. With full knowledge of Gale's condition, and that her sister was looking to him for the protection of her interest (R. 30)) and that he was the major beneficiary under the will, Macfarlane never so much as suggested that Gale seek independent counsel, legal or otherwise.

The testimony of the accused establishes that no one knew the contents of the will, or any of the codicils, but Gale and the accused (R. 37-41). However, Macfarlane told Mrs. Hendee at one time that Gale had taken care of her property and that it was in good shape. He never suggested to her at any time that she consult with anyone else. (45)

5. The gifts to accused were wholly out of proportion to any standing he might have as a friend and confident of Gale and her family. The accused became Gale's personal attorney in about 1944. Thereafter he represented her in various transactions, and for every service rendered by him, he billed her in full for what he consid-

ered the fair value of his services. All of his bills were promptly and fully paid. By the terms of the will and the codicils, the accused received in excess of \$95,000 worth of property, in addition to more than \$10,000 in gifts of cash and securities, prior to Gale's death, making a total of over \$105,000 out of an estate of \$272,000 (R. 42, 283). Thus Mr. Macfarlane received more than one-third of the entire estate. Kostopolus had received gifts approximately equal to those received by Mr. Macfarlane, and his share of the testamentary disposition was approximately equal. This left substantially less than one-third of the estate for the sister Theo, and Aunt Bell Martsolf, and for other close personal friends.

The testimony of the sister Theo reveals that although Theo was married in 1914, and thereafter resided with her husband, first for several years in the east, and then later on the west coast, she maintained as close as possible relationship with her sister Gale. Theo visited in the family home at least once each year, and many years several times a year. She also maintained contact with Gale by telephone and correspondence. She invited Gale to visit with her in her home in San Francisco. She regarded the relationship as a close relationship between sisters throughout their lives (R. 166). She also paid the expenses of Aunt Bell Martsolf to come from California to visit with Gale and her father.

Aunt Bell Martsolf had also been particularly close to the family, especially after the death of Gale's mother. Before the death of Mrs. Swan the family had visited

each year at the home of Aunt Bell. Thereafter, Aunt Bell visited regularly at the Swan home in Salt Lake for periods ranging from two weeks up to five months. Immediately after the death of Mrs. Swan, Mrs. Martsolf took over the care of the Swan household and the caring for Gale until satisfactory help could be engaged. Mrs. Martsolf was finally remembered in the second codicil with a generous \$100 bequest.

The gifts received by Mr. Macfarlane and Mr. Kostopolus were out of all proportion to what they might properly and normally have been expected to receive as friends of the family, in view of the fact that Gale was survived by a full sister, with whom she had maintained a close relationship throughout her life, and by an aunt who had been almost a second mother to her. In addition, there were other friends of the family such as Mr. Bean who visited at the home every day, performed household chores and regularly took his meals there, and the Bridges, who entertained Gale at cards two or three times a week. These friendships would appear to be of at least equal standing to those of Mr. Macfarlane and Kostopolus. However, Mr. Macfarlane and Kostopolus received in excess of two-thirds of the estate, and the others received less than one-third among all of them, some of them in amounts which were mere trifles.

It is upon this factual background, aided by the presumption of fraud, as set forth in this court's decision in the Swan case, upon which the findings of the hearing commission and the bar commission were based, and upon which they should be affirmed.

ARGUMENT

As was noted in the oral arguments before the hearing committee (R. 356), the Supreme Court has already concluded in the will contest case that there has been a civil fraud committed by an attorney against his client. The basic question to be here decided is whether an attorney who has committed a civil fraud against his client should be disciplined. In reaching the conclusion that a civil wrong had been committed, the Supreme Court has said in the will contest case that it could not so hold on the facts adduced without the aid of a presumption of fraud.

No new evidence has been introduced, nor was there any other evidence available to the prosecuting committee. At the outset, we suppose it must be determined what effect the court should give to previous civil determination that a fraud has been committed. We do not contend that this is controlled by the procedures in cases where an attorney is convicted of a felony in a separate criminal case, but the distinction we seek to make here can be demonstrated by reference to the procedures in a felony case. After an attorney is convicted of a felony in a criminal case, discipline automatically follows. The court does not go behind the verdict to re-examine the facts to see how the conviction resulted. It accepts the prior judicial determination of guilt. It is sufficient that the attorney has been tried and convicted.

In this case the defendant was charged in a civil suit with having defrauded his client and after an exhaustive

trial and an appeal to this court, it has now been finally adjudged that the defendant did defraud his client. The property which he sought to obtain by reason of the fraud was taken from him. Query: Does this adjudged fact that he has perpetrated a civil fraud against his client by itself justify disciplinary action; if not will this fact be considered at all; or will the court disregard the civil trial and the facts therein adjudicated and hear the matter anew?

It does present a somewhat anomalous situation if the defendant can be adjudged in a contested civil suit to have been guilty of fraud against his client and in a disbarment proceeding based on the same facts can be held not to be guilty of any fraud, but to be clean as a hound's tooth and immune from discipline. If the matter is to be considered anew, and the presumption of fraud which was raised in the civil suit can not be raised in the disbarment proceedings, of course, this end result might well be reached. The general public is then told on the one hand that there is ample evidence to support the trial court's finding that the petitioner defrauded his client in the civil suit but in the disbarment proceeding where the same facts are reviewed again, and the court concludes (because it can not consider the presumption) that there was no fraud and the attorney's conduct was entirely proper.

As is pointed out in more detail by the authorities cited below, the Supreme Court, by licensing a lawyer, recommends the lawyer to the public as morally qualified to represent clients in matters involving the highest trust

and confidence. If we are to carry the argument made by the accused here into effect, we certainly can not help but shake the confidence of the public in the entire legal profession. In the civil case this court has already held that the evidence, aided by the presumption, amply supported the trial court's finding of fraud by an attorney in regard to the affairs of his client. The same evidence is again before the court for review. Through the application of a legal nicety, the accused urges the court to hold that his conduct was entirely proper, that what he did to his client was without fault, that he should be given a clean bill of health and this court should continue to recommend him to the public as in every way worthy of their trust and confidence.

If the court accepts this argument here, it tells the public that there is some technicality in the law which will permit the court to raise a presumption of fraud to protect a client who has been imposed upon, but that the law will not permit the court to raise the same presumption to protect the public against future misconduct; that the public should accept the high court's recommendation of the lawyer as a man of the highest integrity, although the court has already held that the evidence in the civil suit amply supports a finding that he defrauded his client. Notwithstanding this adjudicated fact of fraud, the court must now find from the same evidence that his conduct was entirely proper, that he should not be disciplined at all, and that the court should hold him out to the public without censure or criticism as a man worthy of the highest trust and confidence from his clients. Such

an anomalous result ought not to be permitted by the law, and when one examines the true nature of the right to practice law and the true nature of a disbarment proceeding, we submit that there is no reason why the presumption can not or should not be raised in a disbarment proceeding.

If the effect of the civil suit is to be disregarded, and the evidence is to be reviewed anew in the disbarment proceedings, then the issue of law as to whether the presumption will be raised becomes a vital consideration.

Our brief is primarily directed to that point. We desire, however, to note that the presumption does not stand alone. It is raised for the very practical reason that generally only the attorney and the client participated in the conferences and they and only they know what happened. In this case the client is dead, and if there were no presumption, fraud could seldom be proved. In a civil suit where facts which in and of themselves lay a suspicion of fraud at the door of the accused are proved, this places upon him the burden of coming forward to convince the trier of the fact that no fraud was involved. The same difficulty of proof exists in a disbarment proceeding as exists in a civil action. The difficulties of finding evidence are equally great. The circumstances raising the suspicion of fraud are the same, and there is much common sense in placing the same burden of explanation on the accused.

We emphasize that the presumption need not and does not stand alone. There are facts undisputably proved showing that the accused was dealing with a client who

was mentally retarded. He was told by her sister that the family was looking to the accused to protect her interests. (R. 30) During her lifetime, he was the recipient of various substantial gifts (R. 63-74) and he knew that his client, who was mentally retarded, was making like gifts to Mr. Kostopulos, who according to the finding of the court, was guilty of fraud and undue influence. Finally, the accused did draft a will which made him a major beneficiary. He did so, even though near that very time he was being charged in another suit with improper conduct in drafting a will for another client which also named him as a major beneficiary. He must have seen a sufficient problem concerning the testamentary capacity of his client in this case to warrant taking her to a doctor. The doctor called in a psychiatrist and thereafter the will was executed. Certainly the defendant ought to have the burden of explaining his conduct and this burden can only be placed upon him by raising a presumption which will shift the risk of persuasion.

We have divided our discussion of this presumption into three parts.

We first refer to the Utah cases concerning the nature of the right or privilege of practicing law. Since the practice of law is a privilege and not a right, and since the purpose of disbarment proceedings is to purify the Bar—not to punish—we think there is reason for raising the presumption of fraud in a disbarment proceeding. We secondly examine the nature of the presumption itself; and finally cite the authorities which permit the presumption of fraud to be considered in a disbarment proceeding.

I. NATURE OF DISCIPLINARY PROCEEDINGS BY THE BAR COMMISSION:

A. History of the Right to Practice Law:

The right to practice law is a special privilege which is held during the good behavior of the person so licensed. Members of the legal profession are charged with a particularly high moral and ethical responsibility because they receive the confidences of the public. Lawyers are disciplined or disbarred if at any time it seems that their character is such that it does not completely justify the confidence and trust that the public must place in them.

Much has been said and written about the nature of the right to practice law. It is not a property right, nor is it a privilege under the privileges and immunities clause of the Federal Constitution. The Utah case of *Rucknbrod v. Mullins*, 102 Utah 548, considered the attorney's duty to defend indigent persons charged with criminal acts. That case gives a rather comprehensive history of the legal profession and the nature of the right to practice law. Since this subject is of considerable importance in the instant proceeding, extensive quotes from that case might be helpful. The *Rucknbrod* case, in turn, quotes heavily from other sources and these quotations are included in the following excerpts:

“The majority of jurisdictions hold that an attorney is an officer of the court with many rights and privileges, and must accept his office cum onere.”

“* * * Historically there can be little doubt that the attorney who represented a client before the courts did enjoy special rights and privileges. The historical growth of the right of an attorney to practice before the common law courts in England is developed by the Supreme Court of Illinois in the case of *In re Day, et al*, 181 Ill. 73, 54 NE 646, 649, 50 LRA 519, the court there said:

‘Originally, no one could appear by attorney without the special warrant of the king, issuing out of chancery or under seal, granting the privilege. The king was considered the fountain of justice, and, as he could not in person decide all controversies and remedy all wrongs, the injured parties were referred to the proper forum, and writs were framed in his name to his judges. Suits were begun in that way, and when he granted the privileges in question it was as a part of that system, and not in a legislative capacity. In a civilized country, where the rights of persons were to be determined in accordance with established rules, either statutory or promulgated by the courts, the employment of persons acquainted with those rules became a necessity, both to the parties and the court. Persons unlearned in the law can neither aid a litigant nor the court, and parliament, at different times, extended the right of the litigant to appoint an attorney to represent him in court. Maugh, Attys. Append. 6, 7. In 1292, Edward I made an order by which he appointed the lord chief justice of the court of common pleas and the rest of his fellow justices of that court, that they, according to their discretion, should provide and ordain from every county certain attorneys and apprentices of the best and most apt for their learning and skill, who might do service to his court and people, and

those so chosen only, and no other, should follow his court and transact the affairs thereof; the said king and his council then deeming the number of seven score to be sufficient for that employment, but it was left to the discretion of the said justices to add to that number or diminish it, as they should see fit. 7 Pol. & M. His. Eng. Law, 194; Dugd. Orig. J. 141. The profession of attorney was placed under the control of the judges, and the discretion to examine applicants as to their learning and qualifications, and to admit to practice, was exercised from that day by the judicial department of the English government, and no legislation sought to deprive the court of the power in that respect, or to invest it in any other branch of the government.'

"The court in some detail then discussed the various early English Statutes relating to admission to practice; the function of the Inns of Court; and the role of "solicitors" and "barristers"; and concluded that:

'The function of determining whether one who seeks to become an officer of the courts, and to conduct causes therein is sufficiently acquainted with the rules established by the legislature and the courts, governing the rights of parties and under which justice is administered, pertains to the courts themselves. * * * The order of requisite qualifications, under such restrictions and limitations as may be properly imposed by the legislature for the protection and welfare of the public. The fact that the legislature may prescribe the qualifications of doctors, plumbers, horseshoers, and persons following other professions or callings; not connected with the judicial system, and may say what shall be

evidenced of such qualifications, can have no influence on this question. A license to such persons confers no right to put the judicial power in motion or to participate in judicial proceedings. The attorney is a necessary part of the judicial system, and his vocation is not merely to find persons who are willing to have lawsuits. He is the first one to sit in judgment on every case, and whether the court shall be called upon to act depends on his decision.' * * *

'The courts of the King's Bench and Common Pleas had from the first, each admitted its own staff of attorneys and the Exchequer seems to have had a staff of clerks who acted as attorneys. No doubt the same persons often acted as attorneys both in the Common Pleas and in the King's Bench — this is shown by an order of 1564, which attempted in vain to suppress this practice. But it is obvious that the necessity for separate admission in each court emphasized the fact that attorneys were the officers of that court; and the same fact was still further emphasized by orders for their constant attendance in their respective courts, and by their possession of the same privileges of exception from public service, and immunity from suit, except in their own court, as the other officials of the various courts enjoyed.'

"* * * In *People v. Culkin*, 248 NY 465, 162 NE 487, 490 60 ALR 851, Ch. J. Chardozo traces the history of the power of the courts to make general inquiries into the conduct of its own officers, the members of the bar, *and concludes that at a very early date the courts exercised rigid control over the professional conduct of members of the legal profession.* He states:

'Thus by Section I of an order made in Michaelmas Term 1654 by the Court of Pleas, as well as by a like order of the Court of Upper or King's Bench, attorneys were required to give notice of their chambers of habitations "under pain of being put off the roll"; no one under like penalty was to practice in another's name, nor was anyone knowingly to permit another to practice in his name, excepting in warrants of attorney for common recoveries "for the prevention of maintenance and brocage, no attorney was to be lessee in an ejectment nor bail for a defendant in this court in any action." Cooke's Rules, Orders and Notices of the Courts of Common Pleas and King's Bench, Michaelmas Term, 1654.'

"Such duties and others are placed upon attorneys on the theory that attorneys are officers of the court. In speaking of these duties Cardozo further says in *People v. Culkin*, *supra* :

'Membership in the bar is a privilege burdened with conditions. *In re Rouss*, *supra*, 221 NY (81), page 84, 116 NE (782), 783. The appellaut was received into that ancient fellowship for something more than private gain. He became an officer of the court, and like the court itself, an instrument or agency to advance the ends of justice. His cooperation with the court was due, whenever justice would be imperiled if cooperation was withheld. He might be assigned as counsel for the needy, in causes criminal or civil, serving without pay. Code Crim. Proc. § 308; Civil Practice Acts, §196, 198. He might be directed by summary order to make restitution to a client of moneys or other property wrongfully withheld. *In re H.*.....87 NY 521.

He might be censured, suspended, or disbarred for "any conduct prejudicial to the administration of justice." Judiciary Law, §88, Subd. 2. All this is undisputed.'

"The present status of the attorney in our judicial system has been a result of historical development which dates back for some seven centuries. Regardless of what may have happened in some jurisdictions to the rights and privileges of attorneys, the right to practice before the court as an officer of the court, still remains. While doctors, plumbers, electricians, barbers, etc., may sell their time and skill to the public by virtue of their license from the state, the attorney alone has the right to set the judicial machinery in motion in behalf of another and to thus participate as an officer of the court in a judicial proceeding. This right springs from his status as an officer of the court. To properly function it is necessary that courts retain control of their officers. The attorney's part has developed until he now is a necessary and essential part of our judicial machinery.

"* * * In addition to this privilege, it has been consistently held that the right of the legislative branch of the government to regulate and control attorneys is subject to the inherent power of the court ultimately to control admission to practice and disbarment. While the language in *Higgins v. Burton*, 64 Utah 562, 232 P. 914, might indicate that we do not adhere to this rule, in a later case, *In re Barclay*, 82 Utah 288, 24 P. 2d 302, 303, we stated:

'It is quite generally held that the power is inherent in the proper court to discipline, suspend, or disbar an attorney for misconduct, independent of any express provision of a statute conferring such authority.'

“In support of this, we cited an earlier case, *In re Platz*, 42 Utah 439, 132 P. 390, 392, where we stated:

‘Nor can the Legislature limit the courts in their rights to determine the moral qualifications of their officers or prevent them from refusing to admit morally incompetent persons to practice, nor compel them to retain such upon the roll. * * * The courts, and not juries or legislators, must ultimately determine qualifications and fitness of their officers.’

“If the right to engage in the practice of law were one of those rights protected by the 14th Amendment, it might be unconstitutional to require those who engage in the practice of law to submit to the burdens now placed on the legal profession. But the cases hold that the right to practice law in the state courts is not a privilege or an immunity of a citizen of the United States which is protected by the 14th Amendment. *In Ex parte Lockwood*, 154 US 116, 14 S. Ct. 1082, 1083, 38 L. Ed. 929, the court refused to review the order of the Virginia Sup. Court which denied the application of a woman for admittance to the bar of Virginia. The court, in so holding, said:

‘The right to control and regulate the granting of license to practice law in the courts of a state is one of those powers that was not transferred for its protection to the federal government, and its exercise is in no manner governed or controlled by citizenship of the United States in the party seeking such license.’ See also *Philbrook v. Newman*, C.C., 85 F. 139, *Mitchell v. Greenough*, 9 Cir., 100 F. 2d 184; *Bradwell v. Illinois*, 16 Wall 130, 83 US 130, 21 L. Ed. 442, *Robinson’s case (In re Robinson)*, 131 Mass. 376, 41 Am. Rep. 239.

“We, therefore, conclude attorneys do have privileges. They do enjoy the right to participate as officers in a judicial proceeding and the right to set the judicial machinery in motion. The court in admitting the attorney to practice, presents him to the public as worthy of its confidence in all of his professional duties. *An attorney holds his office during good behavior and may only be deprived of it for misconduct ascertained and declared by the judgment of the court. Courts, by retaining ultimate control of admission to practice and of disbarment, have undertaken to protect the honor and high standing of the legal profession by refusing to admit those applicants who lack the necessary educational qualifications or who are morally incompetent, and dropping from the rolls those guilty of misconduct.*” (emphasis added)

The next Utah case of consequence explaining the nature of the right to practice law was *Davis v. Ogden City*, 215 P. 2d 616. That case considered the right of the City of Ogden to require lawyers to obtain a City license. In holding that the ordinance was valid, the Court again discussed the position of members of the legal profession.

The Utah cases thus demonstrate that the practice of law has been a special franchise from the very beginning. It is clear that one who engages in the practice of law holds that franchise only during his good behavior and so long as he maintains an impeccable moral character. Indeed, to say that one has a right to practice law is probably a misnomer, for in a more accurate sense, it is no “right” at all, but is merely a special privilege conditioned upon moral worthiness.

B. *Presumption of Innocence.*

We now move to a consideration of the question as to whether there is a presumption of innocence in a disciplinary proceeding which is not present in an ordinary civil proceeding and which will offset the presumption of fraud. It is elemental in the law that a defendant being prosecuted for alleged criminal acts is "presumed" innocent until proven guilty. This really means nothing more than that the prosecution has the burden of proving the defendant guilty beyond a reasonable doubt, and if the guilt is not thus proved there can be no conviction. Professor McCormick explains the history of this presumption of innocence in the following terms:

"The presumption of innocence. This phrase, taken over from continental usage, was merely a general rule that in absence of contrary facts it was to be assumed that any person's conduct upon a given occasion was lawful. So stated, the assumption doubtless has a fair basis in probability. But when it came to be employed, in argument and in instructing juries, in criminal trials under the common law, it became a source of mysticism and confusion. As applied to the accused, any assumption, or 'presumption' of innocence in the popular sense of an inference based on probability, is absurd. The probability is the reverse. The assumption of innocence which is reasonable in the absence of contrary facts becomes quite unrealistic when we include in the picture the facts that the person has been officially charged with the crime and has been brought to trial. Nevertheless, the phrase 'presumption of innocence' has been adopted by judges as a convenient introduction to the statement of the burdens upon the prosecution,

first of producing evidence of the guilt of the accused and, second, of finally persuading the jury or judge of his guilt beyond a reasonable doubt. But the popular meaning of presumption as an inference from probability has lent a false connotation, and defense counsel have naturally used the phrase in argument and in requests for instructions, as if it meant that there was an inherent probability that one officially charged and tried for a crime is innocent.”

* * * *

“The supposed presumption of the innocence of an accused, in fact, is not in any common usage of the term a presumption at all. It is not a presumption in the popular sense of an inference from probability, nor is it a presumption in the legal sense of a rule as to the effect of facts proven as requiring or permitting other facts to be taken as true.” McCormick, *Evidence*, pp. 647-09 (1954).

The Utah Supreme Court has also thoroughly analyzed this “presumption,” but it recognized essentially the same meaning in the *Swan* case, *supra*, when it said:

“The expression that there is a ‘presumption of innocence’ is frequently used even in civil cases where misconduct is involved, but it is usually used to indicate a permissible inference and not a mandatory presumption. But even where a presumption is indicated, such presumption nullifies other presumptions only in cases where the facts giving rise to the presumption have no tendency to establish guilt and are not by their nature opposed to innocence. Such presumption of fraud and undue influence is everywhere recognized but we know of no case which holds that such presumption is nullified by the presumption of innocence. If such were the effect of a presumption of innocence, it

would completely nullify all presumptions of fraud and undue influence for in every such case the confidential adviser is presumed to be guilty of betraying the confidence placed in him. It would be useless to hold that there is a presumption of fraud and undue influence against him which is nullified by a contrary presumption of innocence." (page 693-4 of 293 P. 2d)

In summary, then, attorneys are privileged to engage in a profession which requires the highest moral and ethical responsibility. When a member of the bar is guilty of misconduct, the Court is charged with the responsibility of disciplining and disenfranchising that attorney. Disciplinary proceedings are thus designed to protect the public by dropping from membership those members of the bar who fail to deserve the confidences of the public. The New Jersey Court summarized the purpose of disciplinary proceedings in the following words:

"The object is not punishment of the offender, but rather the disqualification in the public interest of a practitioner of the law who has been guilty of misconduct indicative of moral unfitness for the profession." *In re Frankel*, 20 NJ 558, 120 A. 2d 603 (1956)

Even if disbarment proceedings were punitive, it is unlikely that a presumption of innocence could offset the presumption of fraud and undue influence. In light of the fact that such proceedings are essentially for the protection of the public, it seems clear that no presumption of innocence is present. There surely is nothing in the law to indicate that an attorney charged with misconduct can claim a presumption of innocence in disbarment proceedings in order to lessen his burden of proof.

II. THE NATURE OF THE PRESUMPTION OF FRAUD IN CIVIL PROCEEDINGS.

Legal authorities universally recognize that there is much confusion which surrounds the terms of "presumption," "inference," and "burden of persuasion." A good discussion in this hazy area is found in McCormick, Evidence, Sections 306-22 (1954), and an analysis of the Utah cases is found in Utah Law Review, 5:196-219 (1956). But the Utah Supreme Court has made a clear pronouncement in the very case that gave rise to the instant disciplinary proceeding, and it, therefore, seems unnecessary to consider authority other than *In re Swan's Estate*, 4 Utah 2d 277, 293 P. 2d 682 (1956).

In the *Swan* case the court focused its attention upon the presumption of fraud and undue influence which arises when a confidential adviser drafts a will for his client and names himself as beneficiary. It was conceded that, even among the Utah cases, substantial confusion existed. The court distinguished between the burden of persuasion and the burden of making a prima facie case, stating that in the latter situation the burden is satisfied and the presumption vanishes with the introduction of prima facie evidence, and the other party still has the burden of persuading the fact finder. When the burden is one of persuasion, however, prima facie evidence is insufficient and the presumption remains, and the party attempting to rebut the presumption of fraud must come forth with evidence which will be weighed against the presumption. It was held that the instant situation was one requiring a burden of persuasion.

The court next examined the weight of evidence required to overcome the presumption of fraud when the burden is one of persuasion. It was noted that some cases require a preponderance of the evidence (non-existence of the presumed fact is more probable than its existence), other cases require clear and convincing evidence (non-existence of the presumed fact is very highly probable), and still others require proof beyond a reasonable doubt (all reasonable doubt of the non-existence of the presumed fact must be eliminated). The court observed that there was considerable Utah authority to the effect that in cases of presumed fraud the presumption should only be overcome by clear and convincing evidence. It was felt, however, that the best rule was the one requiring a mere preponderance of the evidence, and the court expressly so held:

“After careful study and consideration we conclude that this presumption shifts the burden onto the confidential adviser of persuading or convincing the fact finder by a preponderance of the evidence that no fraud or undue influence was exerted, or in other words, he has the burden of convincing the fact finder from the evidence that it is more probable that he acted perfectly fair with his confidant; that he made complete disclosure of all material information available and took no unfair advantage of his superior position than that he exerted fraud or undue influence to obtain the benefits in question. This is contrary to our holding in the Jardine case, which is supported by the California cases and some other decisions that clear and convincing evidence to the contrary is necessary to overcome such presumption. We reach this conclusion because we feel that the rule

is more clear and understandable than the rule requiring clear and convincing evidence; that this rule is more apt to produce a just result is more generally recognized as the correct rule governing this situation."

The court therefore held that (1) the instant facts gave rise to a presumption of fraud and undue influence; (2) that this presumption could be overcome by a preponderance of the evidence; (3) that Mr. Macfarlane came forward with a *prima facie* case which was not a preponderance of the evidence and which was, therefore, insufficient to rebut the presumption; and (4) that, consequently, the trial court's finding of fraud and undue influence should be affirmed.

III. PRESUMPTION OF FRAUD SHOULD BE CONSIDERED WITH ALL OTHER EVIDENCE IN DISBARMENT PROCEEDINGS.

As explained in Section II of this Memorandum, the Swan case holds that the presumption of fraud in civil proceedings can be overcome by a *preponderance of the evidence*. This is to say that the very nature of the confidential relationship creates a *prima facie* presumption of fraud, and this presumption is only overcome when the attorney *proves* that his conduct was proper. Much has been written about this same presumption when an attorney is being disbarred and the most exhaustive treatment is found in a recent New Jersey case, *In the Matter of Dougal Herr, Attorney and Counselor at Law*, 22 N. J. 276, 125 A. 2d 706 (1956). This case is helpful for two reasons: first, the facts are similar

to those in the instant proceeding, and second, the New Jersey Court requires the same proof to overcome a presumption of fraud in a civil proceeding as did the Utah court in the Swan case. Also helpful is the fact that this case was elaborately researched, argued and re-argued before the New Jersey Court of Appeals. Mr. Justice Brennan, before ascending to the position of the Justice of the United States Supreme Court, wrote the opinion, from which we quote:

“Respondent has been called upon to answer specific charges of alleged unethical and improper conduct, principally that in various ways, for his personal profit and gain, he abused and took advantage of the confidence reposed in him by his client, Miss Bertha Brechwoldt. By direction of this court hearings on the charges were had before Judge Grimshaw in the Chancery Division. Judge Grimshaw filed conclusions finding that some charges are sustained by the evidence and others were not. Briefs were submitted to this court and we have had oral argument and reargument here.”

There was a conflict in the evidence as to Miss Brechwoldt's mental capacity. Respondent had been the attorney of Miss Brechwoldt for a number of years and he drafted, or caused to be drafted, certain trust instruments and a will for Miss Brechwoldt. These instruments made respondent sole trustee with powers so broad as to enable him to benefit himself. The estate of Miss Brechwoldt exceeded \$450,000. Respondent was charged with the presumption of fraud in that the facts were sufficient to establish a *prima facie* case, and respondent attorney was called to come forth and *prove* himself innocent of any

improper conduct. He failed to establish his proof, and he was disbarred. The court defined the attorney's duty in the following words:

"Confidence so reposed has ever been sufficient reason, in equity, for requiring the recipient to accept the onus of proving *uberrima fides* when his conduct is called in question. This is a great and ancient maxim of equity, applicable to all variety of relations in which influence or dominion may be exercised by one person over another: 'That great rule of court, that he who bargains in matter of advantage with a person placing confidence in him, is bound to show a reasonable use of that confidence; a rule applying to trustees, attorneys, or anyone else.' *Gibson v. Joyes*, 6 Ves. Jr. 266, 31 Eng. Rep. 1844 (Ch. 1801).

"Is the attorney's position different when his conduct is called into question in a disciplinary proceeding? We think it is not, at least when the court is satisfied with reasonable certainty, as is the case here, that a *prima facie* case of disciplinary misconduct has been made out against the attorney. In such a case, the decisions uniformly hold that the burden of overcoming such *prima facie* case by evidence rests on the attorney. See 7 CJS, Attorney & Client, Sec. 33, p. 781, where the following cases are cited: *In re Graves*, 64 Cal. App. 176, 221 Pa. 411 (D. Ct. App. 1923); *In re Horovitz*, 228 App. Div. 484, 240 NYS 343 (App. Div. 1930); *In re Fieldsteel*, 228 App. Div. 470, 240 NYS 481 (App. Div. 1930); *In re Kunstler*, 248 App. Div. 393, 289 NYS 107 (App. Div. 1936); *in re Salus*, 321 Pa. 106, 184 A. 70 (S. Ct. 1936); *In re Gery*, 284 Pa. 121, 130 A. 307 (S. Ct. 1925); *People ex rel. Attorney-General v. Laska*, 105 Col. 426, 101 P. 2d 33, (St. Ct. 1940); *In re Lennox*, 371 Ill. 505, 21 NE 2d 721 (S. Ct. 1939); *In re McLuick*, 383 Ill.

200 48 NE 2d 935 (S. Ct. 1943). As it is abhorrent to the law and our ethical code that an attorney should derive a benefit to himself from the misuse of the confidence arising from the attorney-client relation, 'where from the attendant circumstance there is a reason to presume that the attorney possessed some marked influence, ascendancy or other advantage over his client * * *' the law supersedes the necessity of any inquiry into the particular means, extent and exertion of influence in a given case; a task often difficult, and ill supported by evidence which can be drawn from any satisfactory sources. 1 Story on Equity Jurisprudence (14th Ed. 1918), sec. 433. Thus, the court being satisfied with reasonable certainty that a *prima facie* case of abuse in violation of Cannon 11, by an attorney of a client's confidence for his personal profit or gain has been made out, it is right and just to require that the attorney shall prove either that no advantage of his client was taken or that the advantage received was received without a speck of imposition on his part and was the result of a well considered, definite and settled purpose on the part of the client. In this way substance and meaning are given to the high principles of conduct self-imposed by our profession and eloquently articulated over a century ago by Mr. Justice Nelson speaking for the United States Supreme Court in *Stockton v. Ford*, 11 How. 232, 52 U. S. 232, 247, 13 L. Ed. 676 (1850), where he said:

'There are few of the business relations in life involving a higher trust and confidence than that of attorney and client, or generally speaking, one more honorably and faithfully discharged; few more anxiously guarded by the law, or governed by sterner principles of morality and justice; and it is the duty of the court to administer them in a corresponding spirit, and to be watchful and industrious, to

see that confidence thus reposed shall not be used to the detriment or prejudice of the rights of the party bestowing it.'

"It is urged on behalf of the respondent that no presumption of undue influence on his part is created merely because he was named as trustee of the trust and as a similar fiduciary under the will, both of which were prepared by him, that the constructive fraud principle applicable in cases where an attorney is made a beneficiary of a will or trust which is prepared or supervised by himself has no pertinency here because the respondent obtains no beneficial interest under either document other than the fees and commissions for which he works. But while the respondent is not named as a cestui under the trust or as a legatee or devisee under the will of Miss Brechwaldt, the powers granted to him are so complete and the discretion given him so absolute that his position is tantamount to that of a beneficiary. Further, he has treated the funds as his own without regard to his obligation to his donor or her charitable beneficiaries. There is every indication that this respondent had insured to himself the control of this estate even beyond his own lifetime. He put himself into a superior bargaining position as far as the ultimate beneficiaries are concerned, so that it would not be practical for any of them to contest his actions because in the exercise of his absolute discretion he had the power to 'cut them off.' We can gain but a hint of his purpose from the earlier will under which the respondent made himself a principal beneficiary of Miss Brechwaldt's bounty. A confidential relationship such as existed here between the respondent and Miss Brechwaldt, plus the existence of suspicious

circumstances constituting a strong prima facie case of misconduct, is enough to cast the burden on to the respondent to show by impeccably clear and convincing proof his freedom from fraudulent and unduly influential conduct. In re Blake's will, 21 N.J. 50, 120 A. 2d 745 (1956); In re Rittenhouse's Will, 19 N.J. 376, 117 A. 2d 401 (1955). He has not come close to carrying that burden."

"There is nothing wrong in an attorney accepting the confidence of a client and in managing his property and estate if the client of his own free and unfettered will desires to place such a trust in an attorney. But such a situation is fraught with danger for the attorney. The only way in which he can protect himself is through scrupulously proper conduct, not only in the manner in which he deals with the property but in the documentation of his actions. Only by being able to show clearly each and every one of his transactions no matter how long the period of time can he insure himself of being above reproach. It is not enough for him to say 'I have acted properly in the performance of my trust.' He must prove it."

"There is no profession, save perhaps the ministry, in which the highest morality is more necessary than that of the law. Sharswood, *Essay on Professional Ethics* (1896), p. 55.

"There is in fact, no vocation in life where moral character counts for so much or where it is subjected to more crucial tests by citizen and the public than is that of members of the bar. * * * The fidelity and candor with which he performs his trust, point up reasons that distinguish the legal profession from

other business.' State ex rel. Florida Bar v. Murrell, Fla., 74 So. 2d 221, 224 (Sup. Ct. 1954).

"It has been very aptly said that there is no profession apart from the legal profession where there is greater disparity between true character and reputation. The fault lies in the lack of understanding by the public principally provoked by the transgressors among us — not so much by the flagrant violators, because the public is quick to appreciate the inevitableness of their existence, but by those members who by unconscionable conduct tip the delicate balance in which trust and confidence in a lawyer's actions hangs; not so much by malefactions which are branded criminal but by those that are in the twilight zone of low morality.

"We discipline not to punish, but to purify the bar, to increase its reputation and to protect the public and the courts from fraud and imposition. In re Breidt, 84 N.J. Eq. 222, 214 (Chi. 1915).

"It is the judgment of the court that the respondent was guilty of violating Canon 11 in the ways described.

"The discipline imposed is that the respondent be disbarred."

It is true that this case was decided by a divided court. Three justices dissented, but they did not disagree with the reasoning of the majority of the court as set forth above. The point of contention was simply a question of testamentary capacity and the assertion that the purpose of disciplinary proceedings are to protect the public rather than to punish the attorney. The attorney therein disbarred was not then practicing law and he

had suffered considerable misfortune since his misconduct. The dissenting justices thought that it was unnecessary to add to his burden. This is reflected by the following statement from the dissenting opinion:

“The respondent is now 75 years of age and has practiced at the bar for 50 years with distinction, having been a member of the judiciary. He was humiliated and depressed by publicity concerning the aftermath of an unfortunate matrimonial venture, destroying the pride he once possessed as an authority in the field of domestic relations. He is mentally and physically impaired to a degree where he no longer possesses the mind or the body to permit him to adequately defend himself against the charges made.

* * *

“In this instance the public needs no further protection. Nature has amply and permanently provided it. He is largely incapacitated mentally and physically and unable to practice law or any other useful occupation. He has left the jurisdiction, seeking elsewhere some modicum of comfort and consolation. The devastation wrought by his misfortunes is best reflected in his attempted suicide and the note he left revealing his pathetic appraisal of continued worldly existence.

“The majority conclusions, according to my view, come more within the classification of punishment of the respondent than public protection, and I cannot, on the record before me, vote to block out the few days of dim sunshine which still remain for him.”

The only other case we can find which has facts similar to the facts here present is the case of *In re Mangan*, 32 A. 2d 673 (Vermont) decided in 1943.

In this case one Mary Lamb was a woman 77 years of age. Her sister had died and she employed an attorney to probate the sister's estate. Before the probate could be completed the attorney died and Mangan was retained to complete the probate proceedings. Miss Lamb had a savings account in a bank of some \$9,000. She received notice from the bank that they would not pay any interest on money over \$5,000. Mangan had Miss Lamb withdraw the excess over \$5,000 and deposit it in a joint account with him.

At about the same time as the joint account was created he drew a will for Miss Lamb in which he was named as the principal beneficiary. He drew the will and was present when it was witnessed.

During Miss Lamb's lifetime Mangan withdrew money from the joint account for his personal needs with Miss Lamb's consent. Shortly before Miss Lamb's death Mangan withdrew the full amount and deposited it to his own account.

The findings of the hearing commission, as set out in the opinion of the court do not disclose any overt acts of fraud or undue influence on the part of Mangan relative to the creation of the joint account or the execution of the will. The Commission also found that Mary Lamb had testamentary capacity. The judgment of the court was that Mangan be disbarred.

The general rule relative to the conduct of attorneys in their relationship with their clients is that any

actions on his part which casts reflection upon the profession in the eyes of the public makes him subject to discipline.

The Utah Supreme Court has held that the standard of quantum of proof which should govern the court in a disbarment proceeding is that:

“the charges should be clearly sustained by convincing proof and a fair preponderance of the evidence. The evidence should be clear and convincing.”

See *In re McCullough*, 97 Utah 533, 95 P. 2d 13. See also *In re Evans and Rogers*, 22 Utah 366, 62 P. 913, 53 LRA 952, 83 Am St. Rep. 794, and *In re Hanson*, 48 Utah 163, 158 Pac. 778.

CONCLUSION

We have not been able to find other cases either one way or the other on the presumption problem. If the presumption of fraud is raised in a disbarment proceeding, then we believe that disciplinary action must follow automatically. The Supreme Court of Utah has already held in the civil part of this matter that the presumption of fraud in the civil case could be overcome by a mere preponderance of the evidence. It then went on to hold that Mr. Macfarlane had not by a preponderance of the evidence shown freedom from fraud. If there is any presumption at all raised in a disbarment proceeding, it must be a presumption at least that strong, and if this identical evidence was not strong enough to overcome the presump-

tion in the civil case, it likewise does not overcome it in this case.

We have here an affirmative proof of questionable conduct. An attorney employed to protect the property interests of a person with a retarded mentality, accepts from her during her lifetime many valuable gifts, he stands by while like gifts are made to Mr. Kostopolus, he drew a will which makes him a major beneficiary, etc. To these affirmatively established facts must be added the adjudicated fact that he has defrauded his client of property with a value of over \$100,000.00, and in that adjudication the property has been taken from him. The same identical evidence is before the Supreme Court again for review. If (1) the court can consider the adjudicated fact of the fraud, or (2) if the court may raise the presumption of fraud, then we think it must follow that some discipline is required. If the court may not consider the adjudicated fact of the fraud, nor may not raise the presumption because of the nature of a disbarment proceeding, and the facts which give rise to the presumption will not of themselves warrant disciplinary action, then, of course, the findings should be reversed, and the court should again advise the public that Mr. Macfarlane's conduct was entirely proper and that he is entitled to receive the Supreme Court's recommendation to the public that he is a man in whom the public may repose the greatest confidence and trust and that the bar in general may as a matter of ethics engage in this type of conduct, although if a civil suit is initiated against them, their con-

duct will be fraudulent and the property must be taken from them.

We submit that such an anomalous end result ought not to be affirmed.

Respectfully submitted,

EDWARD W. CLYDE
RAY R. CHRISTENSEN
NED WARNOCK